BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Leased Commercial Access	)	MB Docket No. 07-42

COMMENTS IN OPPOSITION TO REQUEST OF UNITED CHURCH OF CHRIST, OFFICE OF COMMUNICATIONS, INC., MEDIA ACCESS PROJECT REGARDING *LEASED ACCESS ORDER*

Comcast Corporation hereby opposes the request of the United Church of Christ, Office of Communications, Inc. ("UCC")[1] (1) to override the disapproval action by the Office of Management and Budget ("OMB") regarding the information collections required in the *Leased Access Order*[2] and (2) to modify the leased access rate formula adopted in the *Order*.[3] The Commission's Media Bureau has sought comment on UCC's request.

The Commission should reject UCC's request on both counts. A decision by the Commission to override OMB's disapproval of the information collection requirements would be unprecedented and unjustified. OMB's disapproval was well-supported, as detailed in the Opposition filed by the National Cable & Telecommunications Association ("NCTA").[4] An override would fail to remedy the many Paperwork Reduction Act ("PRA") violations in the *Order*, and would run counter to Congress' direction that the Commission demonstrate that it has

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[1] The request was filed by the Media Access Project ("MAP") "on behalf of" UCC, for reasons not explained in the pleading.

[2] *See In the Matter of Leased Commercial Access*, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd. 2909 (2008) ("*Leased Access Order*" or "*Order*").

[3] *See* Request of the United Church of Christ, Office of Communications, Inc., Media Access Project, MB Docket No. 07-42 (Aug. 26, 2008) ("UCC Request").

[4] *See* NCTA Opposition, MB Dkt. No. 07-42, at 2-3 (Sept. 5, 2008) ("NCTA Opposition").

taken every reasonable step to ensure that this information collection is the least burdensome necessary to meet the statute's objectives, is not duplicative, and has practical utility.[5] Additionally, OMB's disapproval of the information collection requirements should not be used as a pretext to attempt a "quick fix" to one of the many problems with the rate formula. Besides being procedurally improper, UCC's proposed change to the application of the rate formula would still result in unlawful rates. Under these circumstances, any action by the Commission to modify the *Order*, without first initiating a formal notice of proposed rulemaking, would only compound the procedural irregularities underlying this proceeding.

I. An Override Of OMB's Disapproval Would Be Unprecedented And Unjustified.

OMB's disapproval of the *Order*'s information collections was the result of a careful study by the agency charged by Congress with overseeing implementation of the PRA. OMB was clearly correct in determining that the Commission failed to comply with fundamental requirements of the PRA.

As OMB found, the Commission failed to demonstrate that the information collection requirements imposed by the *Order* comply with Congress' directive that information collections be tailored to maximize utility, minimize burdens, and avoid duplication. Despite OMB's sweeping disapproval, UCC proposes that the Commission should simply override OMB's determination and retain the information collection requirements as promulgated. Such an action would be inappropriate and contrary to the public policy underlying the PRA.

UCC wrongly asserts that OMB failed to provide sufficient "justification" for the disapproval order.[6] But that assertion has it backward; the burden is on the Commission to

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5 *See* 5 C.F.R. § 1320.5(d).

6 UCC Request at 2.

comply with the PRA, rather than on OMB to provide a detailed explanation of the *Order*'s many failings. In any event, OMB did in fact identify five separate and specific failures of the Commission to demonstrate the need and/or reasonableness of information collection requirements, resulting in a wholesale disapproval of such requirements.[7]

OMB's disapproval was fully supported by the record before it. Comcast, Time Warner Cable, the American Cable Association, and NCTA all provided detailed written submissions before OMB reached its decision.[8] UCC makes only conclusory assertions that OMB's determination was incorrect, and it does not even pretend to answer the detailed facts and arguments that were presented to and considered by OMB. The core of these arguments pertains to problems that cannot be cured months after an order is finalized and published; as NCTA notes, the PRA deficiencies in the *Order* were caused by the Commission's "skipp[ing] the critical procedural step" -- notice and comment -- "that was necessary to understand the burden and impact of its information collection."[9]

A vote by the Commission to override under these circumstances would be extremely rare, if not unprecedented. At bottom, UCC is asking the Commission to "thumb its nose" at OMB, which is the agency to which Congress has assigned primary responsibility for ensuring agency compliance with the PRA. OMB reviews hundreds if not thousands of PRA submissions every year and is indisputably the expert agency in determining compliance with the PRA. While the Commission may have the statutory right to override OMB's disapproval, that is a

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7 *See* NCTA Opposition at 1-2.

8 *See id.* at 2-3 (attaching record submissions).

9 *Id.* at 3 n.3

power that the Commission has exercised very sparingly and only under special circumstances that are not present here.[10]

Finally, an override would achieve no practical purpose. Because the *Order* has been stayed by the United States Court of Appeals for the Sixth Circuit, an override would not result in the rules becoming effective.

II. The Commission Should Reject UCC's Attempt To Use OMB's Disapproval As A Pretext To Revise Other Aspects Of The *Order*.

Recognizing that the new rate formula first announced and adopted in the *Order* is deeply flawed, UCC proposes that the Commission should "take the opportunity" of an override action to make substantive changes in how the formula is applied. UCC apparently believes that its proposed change would remedy the problems with the rate formula and perhaps make the *Order* more defensible in the pending appeal. But UCC's request is both improper and misguided.

OMB's disapproval of the information collection requirements does not create an "opportunity" to revise other aspects of the *Order* without regard to the Administrative Procedure Act ("APA") or the Commission's rules. The *Order* became final on February 1,

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[10] Comcast has unearthed no prior example of a Commission order overriding an OMB disapproval of *all* of the information collection requirements adopted by the Commission in a rulemaking. The two instances in which the Commission has acted to override OMB disapprovals of information collection requirements, neither of which involved rulemakings, are distinct from what UCC proposes here. In one case, after OMB disapproved a requirement imposed on local exchange carriers in connection with annual access tariff filings, the Commission explained that an override was necessary because of the tight schedule associated with those tariffs, and even then the Commission made significant changes (after consultation with affected parties) to the requirement to "greatly reduce" the paperwork burden on the industry. *See Request for Information Concerning Local Exchange Carrier Special Access Demand Quantities*, Order, 2 FCC Rcd 3236, ¶ 19 (1987). There is no such "tight schedule" present in the instant case, nor has the Commission consulted with cable operators concerning what information collections would be appropriate. In another case, the Commission voted to override modifications OMB had ordered to the Commission's broadcast Minority Ownership Report. *See Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications*, Order, 2 FCC Rcd 4507 (1987). The Commission's override was not a wholesale repudiation of OMB's disapproval. Rather, the Commission disagreed with OMB's direction to make the Report voluntary, because a low response rate would compromise the integrity of a study being conducted by the Commission. No such circumstance exists here.

2008, the date of public notice.[11] As UCC correctly observes, no petition for reconsideration of the leased access rate formula was filed. UCC now requests a substantive change in the application of the leased access rate formula as adopted in the *Order*. Specifically, the *Order* directs that, in determining the per subscriber affiliation fee for a bundled channel, "the fee in the contract shall be allocated in its entirety to the highest rated network in the bundle."[12] In its request, UCC belatedly urges the Commission to "allow cable operators to assign values to programming in a bundle where channels do not have explicitly assigned licensing fees."[13] UCC is asking the Commission to rescind this portion of the *Order* and to replace it with an entirely different requirement for determining such fees.[14] Such a revision to an adopted order cannot be properly made without notice and an opportunity for comment.[15] Accordingly, the Commission may not reopen this aspect of the *Order* without first initiating a further notice-and-comment rulemaking proceeding to modify the rules.[16]

Besides being procedurally improper, UCC's proposed new rule would not cure the fatal problems with the *Order*'s rate formula. By establishing a formula that results in a rate of zero

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[11] *See* 47 C.F.R. § 1.103(a).

[12] *Order* ¶ 43 n.137.

[13] UCC Request at 6.

[14] *See id.* at 5-6.

[15] *See Alaska Professional Hunters Ass'n v. FAA*, 177 F.3d 1030, 1036 (D.C. Cir. 1999), subsequent history omitted; *see also* 47 C.F.R. § 1.412.

[16] *See* 5 U.S.C. § 553; *cf.* 47 C.F.R. § 1.41 (authorizing informal requests for action "[e]xcept where formal procedures are required under the provisions of this chapter"); *see also* 47 C.F.R. § 1.429(d) (petitions for reconsideration must be filed within 30 days from the date of public notice of Commission's decision); *id.* § 1.108 (reconsideration on Commission's own motion must be taken within 30 days of public notice of Commission's decision). The Media Bureau's request for "comment" on UCC's request does not satisfy the APA's notice requirement for any modification to the rate formula – indeed, it could not, since the Media Bureau lacks the authority to issue such notice, and the notice was not published in the Federal Register. The *Order* was adopted by the Commission and remains a final order until and unless it is rescinded by the Commission.

in most cases and a few pennies in the rest, the *Order* violates the statutory mandate that leased access rates must be at least sufficient to ensure that the rate "will not adversely affect the operation, financial condition, or market development of the cable system."[17] Comcast's preliminary analysis shows that using the new rate calculation proposed by UCC does not eliminate the zero rate. In fact, it retains a zero rate for nearly every system for one or more leased access-eligible service tiers. Slightly reducing the number of instances in which the formula produces a rate of zero cannot cure the *Order*'s failure to comply with the statutory mandate.

In any event, UCC's proposed change in the application of the rate formula does not even touch on the myriad other fundamental flaws in the *Order*. The new rate formula was not the product of proper notice and comment and was unsupported by the record, and the non-rate rules (besides violating the PRA) were substantively and procedurally flawed as well.

UCC's request is a transparent attempt to use the OMB disapproval as a pretext to make a "quick fix" to the *Order* and to change the legal landscape in the pending appeal. But the revisions UCC requests will not cure the substantive problems with the *Order*, and adopting such revisions in the manner UCC proposes would only compound the procedural irregularities underlying these proceedings.

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[17] *See* 47 U.S.C. § 532(c)(1).

CONCLUSION

The Commission should (1) decline to override OMB's disapproval of the information collection requirements and (2) reject UCC's proposed revisions to other provisions of the *Order*.

Respectfully submitted,

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